

HONORABLE BENJAMIN H. SETTLE

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DANIEL JOSEPH, an individual, on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

TRUEBLUE INC., dba LABOR READY,
INC., and TRUEBLUE, INC., Washington
corporations,

Defendants.

NO. 3:14-cv-05963-BHS

**PLAINTIFF'S SURREPLY TO
STRIKE ARGUMENTS RAISED BY
DEFENDANTS FOR THE FIRST
TIME ON REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL ARBITRATION**

Pursuant to LR 7(g), Plaintiff is filing this surreply to move to strike two arguments TrueBlue raises for the first time in its reply brief: (1) TrueBlue's argument that a nonsignatory such as itself may enforce the arbitration clause in Plaintiff's employment contract because it was acting as an agent of non-party Labor Ready Midwest; and (2) TrueBlue's request that the Court stay the claims against it pending the conclusion of "Plaintiff's arbitration with Labor Ready." It is well established that it is improper to raise new arguments on reply. *See, e.g., Swift v. Zynga Game Networks, Inc.*, 805 F. Supp.2d 904, 917 (N.D. Cal. 2011) (finding it was improper for defendants to "argue for the first time [in their reply] that they should be allowed to enforce the arbitration agreement because they are intended third party beneficiaries"); *see*

1 *also U.S. v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (noting that courts generally decline to
2 consider arguments raised for the first time in a reply brief)).

3 Even if the Court considers these new arguments, both fail because (1) TrueBlue was
4 not acting as Labor Ready Midwest's agent when it sent the spam text messages at issue and
5 there is no applicable arbitration clause with any Labor Ready defendant or TrueBlue, and (2)
6 there is no pending arbitration with Labor Ready Midwest, who is not a party to this action.

7 **I. TrueBlue's New "Agency" Argument Should Be Stricken.**

8 TrueBlue does not develop its new agency argument. It simply declares it is "entitled"
9 to enforce the arbitration clause in Plaintiff's employment contract with non-party Labor Ready
10 Midwest because allegedly TrueBlue was acting "on behalf of" Labor Ready Midwest when it
11 sent the spam texts at issue. (ECF#48, p. 15). This argument is factually and legally wrong.

12 It is wrong factually because TrueBlue was not acting on behalf of Labor Ready
13 Midwest when it sent the spam texts at issue. Plaintiff's employment with Labor Ready
14 Midwest ended on January 3, 2014. (ECF#45, ¶18). TrueBlue did not start sending Plaintiff the
15 spam text messages at issue until May 5, 2014, more than five months later, and nearly two
16 months after Plaintiff had previously told TrueBlue to stop texting him. (ECF#1, ¶19-¶27).
17 Also, TrueBlue presents no evidence to show it sent the texts as Labor Ready Midwest's agent.
18 It just claims Plaintiff's complaint alleges TrueBlue sent the spam texts "on behalf of" Labor
19 Ready Midwest. Plaintiff's complaint makes no such allegation. Indeed, Plaintiff's complaint
20 does not mention Labor Ready Midwest. Instead, Plaintiff's complaint uses the term "Labor
21 Ready" only to refer to "Labor Ready, Inc.," a d/b/a TrueBlue that used. (ECF#1, ¶6). True
22 Blue admits that "Labor Ready Midwest, Inc." is a distinct legal entity (*see* ECF#14, ¶6), but
23 has now attempted to confuse the entities to support its argument. To be clear, Plaintiff has not
24 alleged that True Blue sent any texts on behalf of Labor Ready Midwest.

25 Legally, TrueBlue's agency argument fails for the same reason its equitable estoppel
26 argument fails. A non-signatory to an arbitration clause cannot enforce the clause unless the

claims at issue are “intertwined with the contract providing for arbitration.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009). TrueBlue cannot clear this hurdle because again, the underlying contract is Plaintiff’s employment agreement with Labor Ready Midwest, the employment relationship ended more than five months before TrueBlue sent the spam texts at issue, and TrueBlue had already been told two months before sending the texts at issue to stop texting Plaintiff. In short, TrueBlue’s belated agency argument fails.

II. TrueBlue’s Request to Stay the Case Pending Plaintiff’s Alleged “Arbitration with Labor Ready” Fails Because There Is No Such Arbitration.

TrueBlue essentially makes an entirely new motion at the end of its reply, stating the following: “If the Court declines to compel arbitration of Plaintiff’s claims against TrueBlue, the Court should stay such claims pending conclusion of Plaintiff’s arbitration with Labor Ready [Midwest].” (ECF#48, p. 16). This request fails because there is no arbitration between Plaintiff and Labor Ready Midwest. There is only this lawsuit against TrueBlue.

Plaintiff does not make any claim against Labor Ready Midwest, based on the spam text messages TrueBlue sent him or otherwise. Again, Labor Ready Midwest is not a party here. TrueBlue claims (without support) that Plaintiff meant to name Labor Ready Midwest as a party, and that the complaint simply misnames it, but that is false. Plaintiff has no reason to name Labor Ready Midwest as a party because his employment with Labor Ready Midwest ended on January 3, 2014, TrueBlue did not start sending the spam text messages at issue until more than five months later, Plaintiff had already told TrueBlue to stop texting him two months prior, and thus the spam text messages at issue have nothing to do with Labor Ready Midwest. So not only is there no arbitration between Plaintiff and Labor Ready Midwest pending, but there never will be one, as Plaintiff has no cause to initiate an arbitration with Labor Ready Midwest. Thus, TrueBlue’s new request to stay this case pending an alleged “arbitration with Labor Ready Midwest” should also be denied.

1 RESPECTFULLY SUBMITTED AND DATED this 4th day of February, 2015.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on February 4, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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